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No. 93-1436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STANLEY HENRY, Individually and on behalf of CHANRY COMMUNICATIONS, LTD.,

Petitioner,

vs.

JAMES W. WETZLER, as Commissioner of the New York State Department of Taxation and Finance, and TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Petitioner believes that the considerations warranting the granting of a writ are sufficiently stated in the petition. However, a brief reply is necessary to correct several misstatements contained in respondents' Brief in Opposition.

1. Respondents assert that petitioner has not properly invoked this Court's jurisdiction under 28 U.S.C. § 1257 (a) because he challenges the constitutionality of a State's interpretation of a tax statute, and not the tax statute itself. (Br. in Opp., p. 7). Respondents are wrong. The validity of a statute is drawn into question, for purposes of § 1257 (a), when the application of that statute is challenged on constitutional grounds. See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 441 (1979); *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 473, n. 4 (1989) (citing *Japan Line, Ltd., supra*).[1] Petitioner challenges respondents' interpretation of the definition of a "sale" on Free Press and Equal Protection grounds, thereby properly invoking this Court's jurisdiction under § 1257 (a).

2. Respondents contend that the Papers[2] constituted "shopping papers" and "pennysavers", relying on terms utilized by the parties during the course of the administrative proceedings. (Br. in Opp., pp. 2-3). Respondents do this to subtly communicate the notion that the Papers are not newspapers and, therefore, are not worthy of First Amendment protection. Respondents' characterization of the Papers, and the terminology used at the administrative level, are immaterial. The Papers were newspapers for purposes of the New York Tax Law and the First Amendment. (Pet., pp. 6-7).

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[1] Although *Japan Line, Ltd.* and *Volt Information Sciences, Inc.* were decided prior to the 1988 amendment to § 1257, that amendment did not affect the requirement that the validity of a statute be drawn into question.

[2] Petitioner will continue to use the terms defined in the petition.

3. Respondents assert that the statutory definition of a sale does not violate the Free Press Clause because it does not target the press or any segment of the press. (Br. in Opp., p. 9). However, it is the respondents' interpretation of that statutory definition that results in the discriminatory taxation of free-circulation newspapers. Respondents acknowledge this. (Br. in Opp., p. 10).

4. Respondents contend that the statutory definition of a sale is a generally applicable economic regulation, designed to ensure that the incidence of tax falls only on the last transaction in the production scheme.

> [T]he Legislature was avoiding a pyramiding of tax throughout the production process and determined that the customer should pay the tax at the end of the production chain. That way, the tax would only be paid once .... This means that newspapers that are sold can claim an exemption from sales tax on their purchases of machinery and equipment and newspapers that are not cannot.

(Br. in Opp., pp. 9-10). Respondents' argument makes no sense since there is no tax on the sale of newspapers. See, New York Tax Law § 1115 (a) (5) (McKinney 1987).

5. Respondents ignore the inconsistencies in the precedent respecting discriminatory taxation of the press (Pet., pp. 18-24) and conclude that the "precedents consistently adhere to the same principles." (Br. in Opp., p. 7). If respondents' conclusion was true, the outcome in all three cases would have been the same; however, the outcomes of *Minneapolis Star* and *Leathers* were inconsistent: *Minneapolis*

Star struck a tax that affected only one segment of the press while *Leathers* allowed a tax that affected only one segment of the press. In addition, *Leathers* relied on authority protecting "speakers" rather than the "press", which leaves doubt as to whether those distinct First Amendment values will be treated the same.

6. Respondents challenge petitioner's contention that this Court has left unclear whether a state must have a censorial motive before a statute will be invalidated on First Amendment grounds. (Br. in Opp., p. 8, n. 7). Respondents ignore the fact that the Court upheld the tax in *Leathers* because, in part, it found no "purposeful attempt" to discriminate. 499 U.S. at 448. The Court also inquired whether intent existed in connection with the "additional basis" for finding discriminatory taxation. 499 U.S. at 449-50. However, the Court stated, in the same decision, that motive was not an issue. 499 U.S. at 445 (citing *Minneapolis Star*, 460 U.S. at 592). Thus, after *Leathers*, the role of legislative intent is not clear.

7. Respondents contend that "[e]ven if all [free circulation newspapers] suffer equally without an exemption it is unreasonable to assume that every pennysaver in New York State is similar in content." (Br. in Opp., p. 12). Respondents fail to recognize, however, that petitioner's content-based argument rests on a comparison of the content of paid circulation newspapers and the content of free circulation newspapers, and not a comparison of the content of several free-circulation newspapers. Even if respondents were correct in their assertion that free circulation newspapers include a "multiple of subjects" (Br. in Opp., p. 12), such subjects traditionally differ from that of paid circulation newspapers.

8. Respondents assert that petitioner cites cases from other states which do not conflict with the New York Court of Appeals' ruling. (Br. in Opp., p. 7, n. 6). Petitioner did not cite the foreign state decisions for this purpose but, instead, cited such decisions to illustrate how the inconsistencies in *Minneapolis Star, Arkansas Writers'* and *Leathers* cloud precedent, resulting in misapplication by the foreign state courts. The fact that the New York Court of Appeals' ruling joins these foreign state court decisions in its misapplication of this Court's rulings simply adds support to petitioner's illustration.

9. In an effort to refute petitioner's argument that review would allow this Court to clarify the relationship between Freedom of the Press and Equal Protection, respondents offer a less than rational basis for discriminatory taxation among members of one segment of the press: the avoidance of tax pyramiding. (Br. in Opp., p. 14). That does not make any sense here because, as newspapers, the Papers were not subject to the secondary tax in respondents' imagined pyramid.

For the foregoing reasons, and for the reasons set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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